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Mass Claims and the distinction between jurisdiction and admissibility

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In its 4 August 2011 Decision on Jurisdiction and Admissibility, the majority of the Tribunal in *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic* affirmed that it had jurisdiction to hear the claims of over 60,000 Italian investors against Argentina arising out of Argentina's default on various sovereign bonds. The Decision is historic in its holding that there is no impediment to mass claims under the ICSID Convention and Arbitration Rules and that ICSID tribunals have the power under ICSID Arbitration Rule 19 to adopt procedures to handle mass claims.

Although the Tribunal's finding that it can hear mass claim has garnered the most interest, various aspects of the Decision have sparked debate. The Tribunal held that the Claimants' security entitlements in Argentinean bonds are investments for the purposes of Article 25, ICSID Convention and protected under the Argentina-Italy BIT. Another controversy arises from the fact that the Decision was issued by the majority of the Tribunal without the simultaneous release of the dissenting opinion. The dissenting opinion, which the Decision states is "Forthcoming", has yet to be released.

On 15 September 2011, the Argentine Republic filed a request for the disqualification of the majority of the Tribunal (Professors Pierre Tercier (President) and Albert Jan van den Berg), alleging that the two arbitrators could not be relied on to exercise independent judgment. The disqualification request criticizes the two arbitrators in particularly strident language, arguing that the transmission of the Decision: "(a) without the dissenting opinion of the other arbitrator, (b) without his consent, and (c) without even waiting for a draft of said opinion" together with the majority's rejection of Argentina's request for provisional measures "is a manifestation of an absolutely inappropriate conduct" (para. 20).

Although the Decision raises a series of interesting issues (for example, see Sarah Ganz's post on the Decision's treatment of the 18-month litigation requirement in the BIT), in this post I focus on the majority's distinction between jurisdiction and admissibility, a subject of one of my previous posts. In its Decision, the majority of the Tribunal (the Tribunal) states that it is appropriate and necessary to distinguish issues relating to jurisdiction and admissibility (para. 248) and that the "guiding thought of the Tribunal for distinguishing issues of jurisdiction from issues of admissibility has been the following cornerstone consideration:

> **If there was only one Claimant, what would be the requirements for ICSID's jurisdiction over its claim? If the issue raised relates to such requirements, it is a matter of jurisdiction. If the issue raised relates to another aspect of the proceedings, which would not apply if there was just one Claimant, then it must be considered a matter of admissibility and not of jurisdiction."** (para. 249)

The Tribunal's analysis thus takes a two-fold approach. First, it analyzes the mass claims issue within the context of the Parties' consent to arbitration (a question of jurisdiction) and second, it analyzes the admissibility of mass claims.

The Decision is perhaps the clearest example of an investment treaty tribunal distinguishing between jurisdiction and admissibility. The Tribunal highlights at para. 247 that:

> (i) While a lack of jurisdiction *stricto sensu* means that the claim cannot at all be brought in front of the body called upon, a lack of admissibility means that the claim was neither fit nor mature for judicial treatment;
>
> (ii) Whereby a decision refusing a case based on a lack of arbitral jurisdiction is usually subject to review by another body, a decision refusing a case based on a lack of admissibility can usually not be subject to review by another body;
>
> (iii) Whereby a final refusal based on a lack of jurisdiction will prevent the parties from successfully re-submitting the same claim to the same body, a refusal based on admissibility will, in principle, not prevent the claimant from resubmitting its claim, provided it cures the previous flaw causing the inadmissibility.

With respect to consent, the Tribunal rightly held that if, in principle, it had jurisdiction over one claimant, "it is difficult to conceive why and how the Tribunal could loose such jurisdiction where the number of Claimants outgrows a certain threshold." Further, it highlighted that "the collective nature of the present proceeding derives primarily from the nature of the investment made.":

> The ICSID Convention aims at promoting and protecting investments, without however further defining the concept of investment and leaving this task to the parties through relevant instruments such as BITs … Thus, where the BIT covers investments, such as bonds, which are susceptible of involving in the context of the same investment a high number of investors, and where such investments require a collective relief in order to provide effective protection to such investment, it would be contrary to the purpose of the BIT and to the spirit of ICSID, to require in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration. In such cases, consent to ICSID arbitration must be considered to cover the form of arbitration necessary to give efficient protection and remedy to the investors and their investments, including arbitration in the form of collective proceedings. (para. 490).

In conclusion, the Tribunal, rightly held that "the "mass" aspect of proceedings relates to the

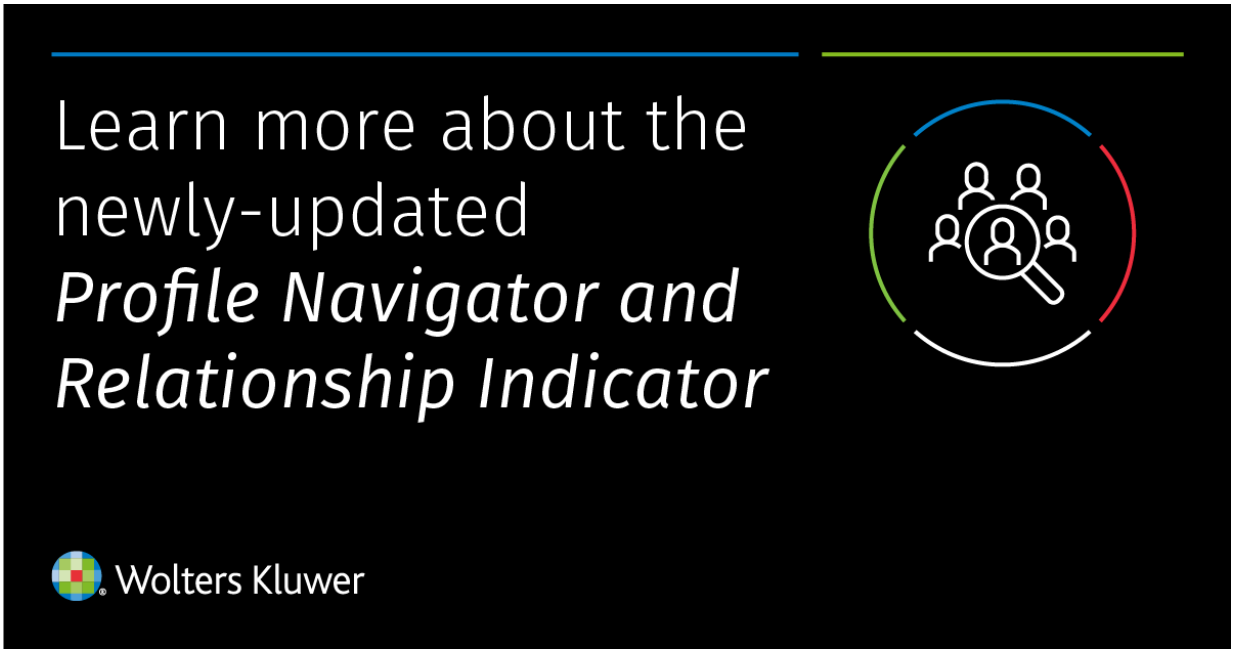
modalities and implementation of the ICSID proceedings and not to the question whether Respondent consented to ICSID arbitration. Therefore, it relates to the question of admissibility and not to the question of jurisdiction." (para. 492).

The Tribunal took a purposive approach to the interpretation of the ICSID Convention's "silence" as to mass claims, holding that it would be "contrary to the purpose of the BIT and to the spirit of ICSID to interpret this silence as a "qualified silence" categorically prohibiting collective proceedings, just because it was not mentioned in the ICSID Convention" (para. 519).

With respect to the adaptations, the Tribunal identified the need to adopt mechanisms to allow a simplified verification of evidentiary materials with respect to each individual claim (para 531) and the manner of the representation of the claimants (paras. 531-532). In finding that it had the power to adapt procedures to address the "mass claims" aspect of the case, the Tribunal states that adaptations must consider the principle of due process and a must seek a balance between the procedural rights and interests of each party (para. 519). In assessing that balance the Tribunal considered: (i) under what conditions is it acceptable to change the method of examination from individual to group treatment; (ii) to what extent are Argentina's defense rights affected in comparison to 60,000 separate proceedings; and (iii) is it admissible to deprive Claimants of certain procedural rights (para. 539).

Argentina's had argued that there are strong policy reasons why ICSID is an inappropriate forum to address issues with respect to sovereign debt restructuring. The Tribunal flatly rejected this argument, rightly stating that "Policy reasons are for States to take into account when negotiating BITs and consenting to ICSID jurisdiction in general, not for the Tribunal to take into account in order to repair an inappropriately negotiated or drafted BIT."

It its disqualification request, Argentina suggests that the procedural mechanisms set out in the Decision are an unjustifiable limit on Argentina's right of defence and further evidence of the Tribunal's alleged lack of independent and impartial judgment (paras. 25 et seq.). Although Argentina has characterized the majority's Decision as "egregious" and various Tribunal statements as "shocking" and "absurd", this hyperbole should seen for what is—a regrettable attempt to appeal a tribunal decision through the guise of a disqualification request. The majority of the Tribunal's approach to mass claims is correct in principle and practical, objective and fair-minded in practice. International arbitration can be an effective and efficient system of dispute resolution because of its ability to adopt flexible procedures to address myriad claims and issues. The majority's Decision reflects this approach and will stand the test of time.



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